Nos. 18-2283 & 18-2380

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERICKSON TRUCKING SERVICE, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Appeal from the National Labor Relations Board
Agency Case No. 07-CA-178824

ERICKSON TRUCKING SERVICE, INC.'S CORRECTED BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-2283, 18-2380 Case Name: Erickson Trucking Service, Inc. v. NLRB

Name of counsel: Keith E. Eastland, Matthew M. O'Rourke

Pursuant to 6th Cir. R. 26.1, Erickson Trucking Service, Inc.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on February 11, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Keith E. Eastland

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Erickson's Trucking Service, Inc. ("Erickson's") requests oral argument. This case involves significant legal issues impacting the Board's improper application of its *Wright-Line* analysis and failure to follow its own precedent without explanation. The National Labor Relations Board's conclusion, which merely adopted the ALJ without analysis, that Erickson's failed to prove that it would have acted for legitimate business reason when it laid off six employees, regardless of the alleged animus, presents important questions of law concerns the appropriate allocation of the burden of proof.

The Board's Order is based on significant errors, including the Board's failure to follow and apply controlling law. The Order is also predicated on multiple factual errors and mischaracterizations of the record evidence.

Erickson's respectfully submits that oral argument will be helpful for the Court as it considers the extensive record and the important legal issues.

JURISDICTIONAL STATEMENT

The Board issued its Decision and Order in this case on August 27, 2018. This Court has jurisdiction over Erickson's petition to review under 29 U.S.C. § 160(f).

STATEMENT OF ISSUES

1. Controlling law required the Board to consider the General Counsel's *prima facie* burden and Erickson's rebuttal to the *prima facie* case separately from Erickson's legitimate business defense. *NLRB v. Fluor Daniel*, 161 F.3d 953, 966 (6th Cir. 1998). Erickson's proved its affirmative defense, based on an undisputed business case that the layoffs would have occurred regardless of union animus. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400-03 (1983). The Board credited that business case but held that Erickson's violated the Act based on evidence of union animus as a motivating factor. Is the Board's Order enforceable because it failed to follow its own rule?

2. An employer does not violate the Act even if union animus was a motivating factor in a discharge if there is a business reason that would have resulted in the same discharges. *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 656-66 (6th Cir. 2005). Substantial evidence proves that Erickson's laid off the operators for legitimate business reasons that the Board credited. Substantial evidence also proves that Erickson's decided to lay off the operators in the summer of 2016 because that was the "perfect time" to sell the cranes. Is the Board's Order that Erickson's would not have sold cranes and laid off operators for legitimate business reasons enforceable?

3. *Wright-Line* requires the Board to find that Erickson's did not violate the Act if it would have laid off the operators even if the General Counsel proved animus. *Transp. Mgmt.*, 462 U.S. at 400-03. The Board relied on the General Counsel's *prima facie* case of animus to hold that Erickson's legitimate business reason for the layoffs was pretext. Is the Board's Order enforceable?

4. There is no substantial evidence of pretext unless the Board's finding "is reasonable in view of the evidence as a whole." *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 873-74 (6th Cir. 1995). The Board's reliance on four factors to find pretext was unreasonable and ignored the substantial and undisputed evidence. Is the Board's Order enforceable?

5. To support a violation of Section 8(a)(3) of the Act, the Board must make particularized findings that each employee engaged in protected activity and that the employer took action against each employee because of such activity; animus for one employee cannot be inferred for others. *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 781 (6th Cir. 2002). There is no substantial evidence that the General Counsel met its *prima facie* burden of making a particularized showing to prove that Erickson's laid off the operators because of their own protected

activity, and the Board admitted that there was no such evidence for each employee. Is the Board's Order enforceable?

6. The Board exceeds its statutory authority when it awards a remedy that grants employees something more than make-whole relief. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940). The Board ordered that the employees' search-for-work expenses should not be offset from interim earnings. The Board also ordered Erickson's to reinstate the six employees to jobs and positions that no longer exist because Erickson's followed-through on its credited business plan to exit the small crane market. Both remedies are punitive. Is the Board's order enforceable?

STATEMENT OF THE CASE

There is no dispute that Erickson's has been executing a long-term plan to reorganize its crane operation business. That plan includes divesting itself of smaller non-profitable cranes. This plan had its beginnings more than a decade ago when Steve Erickson noticed that demand for small cranes – normally the reliable workhorses of his fleet – was slipping. The plan to sell smaller cranes developed as the profits associated with those cranes significantly decreased. The plan expanded with more concrete steps in 2014, when Erickson's purchased several larger cranes designed specifically to work in the emerging green energy wind market – an area thought to have huge growth potential.

Erickson's plan to divest itself of smaller cranes became even more refined in July 2015. That is when Steve Erickson realized that he needed to sell some underperforming small cranes and reinvest the proceeds into larger, more profitable equipment. The wisdom of this decision was confirmed in April and May 2016, when Brent Erickson, the Company's new controller, analyzed the cranes, their usage, and their revenue, and determined that the Company was losing significant money by owning and operating small cranes. Erickson's began to list multiple small cranes for sale in May 2016 because, business-wise, it was the perfect time to sell them.

The Company's business case supporting its decision to list the small cranes was undisputed and so overwhelming that the ALJ and Board credited it: "In sum, I do not doubt Erickson's contentions concerning general business trends in the industry and his long-term plans to adapt to them."

Erickson's needed to lay off six operators as a consequence of its legitimate decision to shrink its stable of smaller cranes. This would have been required regardless of the alleged union animus in this case. In fact, the record demonstrates that there was not enough work to justify keeping one operator, let alone six, after the smaller cranes were listed for sale. The record also confirms that the six operators selected for layoff did not have the training or the experience to go where the Company was going: big cranes for big work.

The six layoffs in the summer of 2016 were going to happen as part of an unassailable and credited long-term business objective. Nevertheless, the Board concluded that these layoffs violated the Act. That conclusion conflicts with well-settled Board law and is not supported by substantial evidence. The Court should grant Erickson's petition for review because the Board, by rubber stamping the ALJ's findings and analysis, modified and failed to apply its own controlling standard under *Wright-Line* without explanation.

The Board developed its *Wright-Line* analysis for cases just like this – cases where dual motives exist, *i.e.* the employer would have taken the same

actions for legitimate business reasons even in the face of some evidence that animus was a motiving factor. Said differently, if the Board finds that the employer would have laid off employees regardless of union animus, it must find that the layoffs did not violate the Act.

Here, the business case for layoffs, independent of the alleged animus, is undisputed. It was credited by the Board. Remarkably, however, after crediting Erickson's business case and the unrebutted record evidence supporting the sale of the small cranes, the Board concluded that Erickson's failed to meet its burden under *Wright-Line.* In doing so, it made several fatal flaws, including conflating the General Counsel's *prima facie* case with Erickson's defense.

The Board relied on evidence supporting the conclusion that union animus was a motiving factor in the layoffs to also conclude that there was pretext, and that, therefore, Erickson's could not establish its defense under the second part of *Wright-Line*. But that misses the entire point of dual-motive cases. It renders the second prong of *Wright-Line* a nullity. If the Board's rationale is permitted to stand, there will be no second prong under *Wright-Line*; evidence of animus as a motivating factor will be sufficient to establish pretext and undermine the employer's affirmative defense in all cases. That's not the law. As the Supreme Court and this Circuit have explained "the presence of an anti-union motivation is not the end of the matter." *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 399

(1983); *NLRB v. Fluor Daniel*, 161 F.3d 953, 966 (6th Cir. 1998). The Board's failure to follow its own standards or explain why they are being altered renders its Order unenforceable.

I. STATEMENT OF FACTS

A. Erickson's.

Erickson's is a family-owned, long-term unionized business "involved in crane services, crane rental, general transportation, trucking, heavy transportation," rigging services, moving machinery in and out of plants, and crane assembly. (JA 112). Steve Erickson is the sole shareholder and President. He has worked in the crane business for more than 45 years. (JA 111).

Brent Erickson, Steve Erickson's son, started as Erickson's controller in March 2016. (JA 93).[1] Brent has a significant financial and professional background. He received his Bachelor's degree from the University of Michigan in 2002. (JA 93). He served as a Captain in the U.S. Army from 2002 to 2007 and completed two tours in Iraq. After an honorable discharge, Brent obtained a Master's in Accounting from Grand Valley State University in 2008. *Id*.

[1] Steve Erickson is referred to as "Mr. Erickson." Brent Erickson is referred to as "Brent" or "Brent Erickson."

B. Erickson's long-term plan to adapt to the general business trends in the small crane industry that the Board "did not doubt."

1. Erickson's small cranes are less profitable than its large cranes.

At the time of the hearing, Erickson's owned 36 cranes.[2] (JA 3739, 95). Internally, Erickson's classifies cranes by tonnage,[3] and groups them into four categories:

- Above 120: cranes with a capacity of more than 120 tons.
- Under 120: cranes with a capacity of 120 tons or less.
- Carry deck cranes: small industrial cranes used inside factories or other facilities.
- Tower cranes: construction cranes typically used in urban downtown areas. (JA 94)

Only the distinction between "Above 120" ("large cranes") and "Under 120" ("small cranes") is relevant for this appeal.

It is undisputed that large cranes are more lucrative than small cranes (JA 114), and they are "much more profitable." (JA 97). The rental rate for large cranes is higher (JA 114); there are fewer large cranes to work the market (JA 95); and the large cranes generate work for Erickson's accessory equipment and other cranes. (JA 114).

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[2] Erickson's sold in June 2017 two 40 ton cranes, two 60 ton cranes, and two 90 ton cranes. The four cranes at issue in this case were four of the six cranes sold.

[3] Tonnage is the capacity the crane manufacturer assigns to the crane; that is, the amount of weight that the crane can lift. (JA 113).

Operators are assigned to equipment based on their qualifications.[4] Erickson's assigns some crane operators to operate a specific crane, but cranes are not exclusive to one employee. (JA 152). Operators can and do operate different equipment based on their skill level, their qualifications, and available work. (JA 64).

2. Crane market trends: demand for larger cranes is increasing and small crane work is drying up.

The unrebutted evidence establishes that Erickson's customers have demanded bigger cranes with longer booms, and that the Company has less work available for small cranes.[5] Based on his more than 45 years of experience in the industry, Mr. Erickson explained without contradiction:

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[4] "Qualifications" and "certifications" are two different concepts. To become certified for a type of crane, an operator must pass a written and practical exam and work for 2,000 hours "in the seat" of a crane. (JA 24).

For Erickson's, the simple fact that an operator obtains a certification for a particular piece of equipment does not mean that the operator is qualified to run that equipment. Erickson's provides equipment-specific training to each operator, and it will not assign an operator to certain equipment until he or she is certified and qualified to operate that equipment. (JA 126).

[5] Erickson's crane purchases, which are driven by market needs and demands, reflect this. In the past several years, Erickson's has sought to expand its footprint in the wind energy market, which requires large cranes. (JA 114). The Company purchased its first crane specifically to work in the wind market in 2014, and it has purchased three cranes specifically for the wind market since. *Id*. Erickson's has not purchased any "traditional" small cranes, like the 40 and 60 ton cranes at issue in this case, since at least 2013. (JA 114-15).

> [T]he small cranes no longer find much work in our area. There was a time when a 35 ton RT was a big crane. And now [Erickson's] has trouble selling anything less than a 90-ton RT. The customers just want bigger cranes, longer booms. It's just market driven. So we're selling small cranes, buying larger cranes all the time.

(JA 115). This trend towards larger cranes has "been going on for several years." (JA 98). Indeed, the hours billed for Erickson's small cranes have been "down and dropping" over the last 10 years. (JA 116).

Hard numbers confirm the lack of work available for small cranes and their operators. For example, in 2015, operators worked a total of 54,902.5 hours. That number dropped to 48,221 in 2016. (JA 3763-65). That is a loss of more than 6,600 hours of work, more than 12% in one year. Through March 25, 2017 (one month before the hearing), Erickson's operators had worked only 8,454 hours, which projects to approximately 36,735 hours for the entire year – an additional loss of more than 11,000 hours, or an additional 23% decline for 2017. *Id.*

Erickson's ideally wants to work its small cranes for at least 1,500 hours a year, but it could potentially justify keeping and running a crane if it bills at least 1,000 hours in a year. (JA 116). Erickson's has not consistently billed over 1,000 hours on any of the four small cranes at issue in any of the last ten years. (JA 3761-62).

3. Erickson anticipated, since at least 2015, that declining small crane demand and the need to sell small cranes would cause permanent layoffs.

Erickson's trend of buying large cranes and selling small ones is consistent with the declining market and available work for small cranes. This undisputed business restructuring preexisted all of the alleged protected activity and animus in this case. Indeed, Mr. Erickson contemplated and anticipated putting the small cranes up for sale since at least July 2015, when he cautioned Keith Stephenson about layoffs.[6] (JA 129).

When Brent Erickson started working at Erickson's in early 2016, one of his first tasks was to assess the equipment owned by the Company, and how it used each piece of equipment. (JA 120). Brent quickly became aware of the market trends that his father had observed for years, and as the new controller, he determined that Erickson's owned an excessive amount of unused and under-used equipment:

> One thing that's striking about our Company when you come there, there's so much idle equipment. It's like Noah's Ark. There's two of everything that you could

[6] Mr. Stephenson, who was a Teamster at the time, informed Mr. Erickson that he wanted to transfer to work in a position represented by the Union. Mr. Erickson had already started to examine his small crane segment, and he "knew that it was coming down the road that the small crane segment was going to go away and that would impact him." (JA 129). Consequently, Mr. Erickson did not object to the move, but he specifically cautioned Mr. Stephenson about anticipated layoffs within the Operating Engineers. *Id*.

> imagine around the yard. [Mr. Erickson's] got all this equipment and we're not using it. When you're not using equipment, you're just paying interest on it so we had a lot of discussions right away about idle capacity, unused capacity, the cost of interest, the cost of this capital that's just sitting around.

(JA 98).

Mr. Erickson and Brent discussed Brent's initial review in March 2016. *Id*. They also reviewed each individual crane because they wanted to determine whether it was "worthwhile to keep the cranes," or if the Company would be financially better-off if it sold the cranes. (JA 99). For each crane, they examined the number of hours billed, the amount of revenue generated, the amount of profit (if any), and the crane's age and maintenance status. They "just tr[ied] to figure out if we had the right mix, and what we're doing right, and what we're doing wrong." *Id*.

The Ericksons specifically discussed selling smaller cranes in March and April 2016, before the close of Erickson's fiscal year on April 30, 2016. (JA 120). On or around April 30, 2016, they analyzed whether they had a "good year or bad year." (JA 117). Based on their fair and objective view of the following objective facts, they decided selling the 40 and 60 ton cranes was in the Company's best interest.

a. Hours billed by crane categories.

First, Erickson's reviewed the hours billed by each crane category from 2005 through 2016, which confirmed the shift in demand for larger cranes. (JA 3755, 3759). For example, in 2005, cranes in the "Under 120" category billed 12,664 hours (77.9% of the total crane hours billed that year). By 2016, however, the number of hours billed by cranes in the Under 120 category fell by almost half, to 6,688 (39% of the total hours billed). *Id.*

On the other hand, the Above 120 cranes saw a dramatic increase in the number of hours billed. In 2005, Erickson's billed 2,645 hours on the Above 120 cranes (16.3% of total crane hours billed). In 2016, Erickson's billed 8,662 hours on its Above 120 cranes (50.5% of total crane hours billed).

b. Total billings (i.e. revenue) by crane category.

Second, and more importantly from a business perspective, Erickson's reviewed the amount of total billings (revenue) by each crane category from 2005 through 2016. (JA 3755-56). In 2005, the hours billed by the Under 120 cranes amounted to $790,183, and the hours billed by the Above 120 cranes equaled $929,977. Eleven years later, in 2016, the billings for Erickson's Under 120 cranes had increased only slightly, to $1,066,233. In that same time period, the billings for the Above 120 cranes had skyrocketed—increasing more than six fold, to nearly six million dollars ($5,912,361). *Id.*

Mr. Erickson and Brent Erickson also reviewed the billings by crane category as a percentage of the Company's total crane billings. It showed that the Under 120 cranes produced approximately 44.2% of Erickson's total billings in 2005. By 2016, that percentage decreased to only 14.4%. In contrast, the Above 120 billings increased from 52% of the total crane billings in 2005 to 79.7% in 2016. Said differently, large cranes represented nearly 80% of all crane revenue for Erickson's business. (JA 3755, 3758).

After reviewing this data, it was obvious that most of the Company's revenue was generated by the Above 120 cranes and it should focus efforts on that segment of the business. The market demanded it and it was the prudent course of action. As Brent Erickson explained:

> It's an obvious conclusion that we're spending a comparable amount of time on large cranes and small cranes but we're generating almost all of our revenue from the larger cranes. We have a wrong business mix right now so that's something I just – I try to convey. That goes along with the idle equipment and the unused capacity that we talked about.

(JA 101).

c. Hours billed for small cranes.

After determining that the hours and billings had steadily decreased for the Under 120 cranes, Erickson's examined the hours billed for four of its smallest cranes: Crane 285 (40 ton), Crane 287 (40 ton), Crane 290 (60 ton) and

Crane 291 (60 ton). Erickson's reviewed these specific cranes because they were (a) small cranes; (b) all purchased in 2005; and (c) had not yet billed 10,000 hours. (JA 119). It was the "perfect time" to sell cranes like these before they required additional, and expensive, maintenance. They were in the "sweet spot." *See infra*.

The data for these four cranes demonstrated that their hours billed in 2015 was less than their hours billed in 2007, and that the hours had significantly declined. (JA 3761-62). None of these small cranes had billed over 1,000 hours a year since 2013, and 2007 was the only year in which the four cranes averaged over 1,000 hours billed. Further, the total hours dropped by 637 between 2013 and 2015, reflecting a more than 21% decrease for these small cranes in an already-faltering market segment.

Ultimately, Mr. Erickson and Brent Erickson determined that these small cranes were losing money (JA 155), and that they did not generate enough working hours to warrant keeping them. (JA 119).

4. Erickson's tries to maximize a crane's value by selling the crane for the highest price and at the "perfect time" or at its "sweet spot" of ownership.

Erickson's must decide whether and when to sell cranes. The Company considers a number of factors before deciding on the right time, including:

- The amount paid for the crane;

- The amount of revenue generated by the crane over its lifetime;
- Maintenance and repair costs for the crane over its lifetime;
- The approximate amount of interest the Company has paid for the crane; and
- The crane's current fair market value. (JA 96).

The Company generally tries to sell cranes when it has owned them for 10 years, or when it has operated the crane for approximately 10,000 hours. (JA 114). The 10 year/10,000 hour mark is the "perfect time" to sell a crane:

> If you haven't put a lot of maintenance in, but you're at about a 10 years or 10,000 hour mark on the crane, well, then you're at a perfect time because you probably haven't done a lot of maintenance on it. So, you can maximize your billing, maximize your resale, minimize your equipment cost, and it's a perfect time to do it. If you can identify [the cranes], that's when you need to get out.

(JA 96). Erickson's typically sells one to two cranes a year. (JA 3740).

5. Based on these legitimate business factors, Erickson's decided to list small Cranes 285, 287, 290 and 291 for sale in May 2016.

By May 2016, Mr. Erickson had firmly decided to list for sale Cranes 285, 287, 290, and 291. (JA 120). Mr. Erickson reached this decision after he reviewed the declining trend in the small cranes market; a decrease in the hours billed by Erickson's small cranes; an increase in the hours billed by Erickson's larger cranes; an increase in the revenue generated by Erickson's larger cranes; that

these four small cranes worked a decreasing number of hours; and that it was the "perfect time" to sell the cranes. (JA 119).

Mr. Erickson ordered appraisals for his equipment in late April or early May 2016, and he received the completed appraisals in the middle of May. (JA 117). Around that same time, Mr. Erickson contacted three crane brokers. He contacted each broker on the same day in mid-May 2016. (JA 117). Mr. Erickson had already decided to sell the four small cranes when he spoke with the brokers in the middle of May: "[The cranes] were available for [the brokers] to sell at that point in time[.]" (JA 120).

On May 14, 2016, Mr. Erickson emailed Gene Landres, a broker with Quality Cranes & Equipment, LLC. Mr. Erickson wrote: "I will have six to 10 machines for sale this year. Details in a couple of weeks." (JA 3768). The next day, Mr. Erickson emailed Mr. Landres and stated that he would send to Mr. Landres "the list of smaller cranes when I get it done." (JA 3767).

The four small cranes were "for sale" on May 14, 2016. (JA 120). Mr. Landres sent a photographer to Erickson's in May to photograph some of the cranes that were for sale. Other cranes were on jobsites and could not be photographed at that time. (JA 150).

On July 13, 2016, less than a week after the final layoff, Mr. Erickson sent Mr. Landres and two other crane dealers an email in which he stated: "We

have some cranes and accessories listed on the attached spreadsheet that are for sale." (JA 4049-50) (emphasis added). The spreadsheet of equipment for sale includes the four cranes at issue here. *Id.*

> On August 29, Mr. Erickson emailed Mr. Landres and stated:
>
> I am interested in selling some machines. The numbers your [sic] using appear to be auction pricing which has been quite low recently.
>
> I am not in any hurry to sell anything and will wait for the right buyer that wants well maintained equipment.
>
> With that said, I do understand the market is down and would be willing to look at offers that fall between your pricing and my pricing.

(JA 4054-62). Mr. Landres responded that Mr. Erickson's "plan to wait for the right buyer has worked well in the past because there was always strong demand for used cranes." *Id.*

6. Erickson's decision to sell the small cranes was not related to the Union or any protected activity.

The decision to sell the four cranes was supported by a compelling business case. (JA 120). Erickson's sells cranes "all the time," and the decision to sell a crane is "independent of any other activity. It's based on revenue and income. If [Erickson's] can't make any money at it, there's no sense in owning it." *Id.* *See also* JA 3740 (showing that Erickson's sold 22 cranes from 2003 through April 2017). When Mr. Erickson and Brent Erickson discussed the crane data and the decision to sell cranes, Mr. Erickson never said anything about the Union, (JA

103), and the record confirms that there was no significant work for these small cranes. The General Counsel failed to present any evidence that Erickson's turned down work that would keep a single employee busy, let alone six.

It is true that since they were listed in July 2016, Erickson's has "used [Cranes 285, 287, 290, and 291] occasionally when we have work for them." (JA 151). Joint Exhibits 2-11 are Erickson's work orders from July 2016 (the month in which the cranes were listed for sale) through April 21, 2017 (the last weekday before the start of the hearing). (JA 158-3733). These work orders reflect when a crane was scheduled to work. They do not establish if the crane was actually used or the number of hours it worked.[7] These records confirm that any work assigned to the four small cranes was minimal and insufficient to support even one full time employee. Indeed, each crane was scheduled to work only the following percentage of total work days from July 1, 2016 through April 21, 2017:[8]

[7] These work orders do not indicate the amount of time a worker worked on a specific job, or the amount of time the assigned equipment was used on a specific job. (JA 4070-77, ¶ 2). The fact that Erickson's scheduled an employee to work a certain piece of equipment is not actually evidence that the employee operated the equipment on that day.

[8] The period of July 1, 2016 through April 21, 2017 is 294 days, or 42 weeks. Assuming that Erickson's did not schedule work on Sundays, Independence Day, Labor Day, Thanksgiving, Christmas, and New Year's Day, there were a possible 247 days on which the cranes could have been scheduled from July 1, 2016 through April 21, 2017. This percentage was calculated by dividing the total number of times a crane was scheduled to work by 247.

285	287	290	291
6.9%	31.6%	25.5%	27.1%

And, when the cranes were sporadically scheduled to work, the work was completed by one of the 14 Union members who remained employed after the layoffs at issue in this case. (JA 127). Thus, it cannot be said that the cranes have worked regularly, or even "fairly regular[ly]," since July 1, 2016. (JA 151).

C. Erickson's laid off the six operators because they were the least qualified of all of Erickson's operators. None of the operators who were laid off engaged in any conduct or union-related activity that was different from the union operators who were not laid off.

Erickson's has laid off several hundred employees in the history of the Company. Layoffs are simply "the nature of the business." (JA 120). Layoffs are especially common for the Operating Engineers. The projected-based, fluctuating work performed by the Operating Engineers requires Erickson's to lay off employees weekly, "or sometimes more than once a week," depending on the availability of work. (JA 120, 53).

The undisputed evidence demonstrates that Erickson's selected the six discriminatees for layoffs because they were the least qualified operators, and because there was no work for them to perform.

1. Keith Stephenson.

Erickson's laid off Mr. Stephenson because he was the Company's least qualified operator. (JA 126-27). Mr. Stephenson was not certified to operate

any crane, and he had no experience or qualifications running the cranes: "His role had been as a truck driver and as an oiler, so he had very limited qualifications." (JA 126). Mr. Stephenson was not assigned to any crane because he was neither certified nor qualified to operate any cranes.

During the layoff meeting, Mr. Erickson told Mr. Stephenson that he had decided to lay him off because of "experience, qualifications, and certifications." (JA 90, 128). When Mr. Stephenson was laid off, the 19 operators who remained employed had more qualifications than Mr. Stephenson. (JA 127-28). Many of them had raised concerns regarding their pay. (JA 122). Mr. Erickson was not aware of whether Mr. Stephenson engaged in any conduct or union-related activity different from the operators who were not laid off.

2. Matt Rowe

Mr. Rowe was a short-term employee who worked "off and on for some time" and he "generally got laid off at the end of his projects." (JA 130). Mr. Rowe's payroll records illustrate his sporadic work for Erickson's: in the 17 months before his layoff in question, Mr. Rowe did not work for Erickson's from January 31 – August 23, 2015, and for nearly a month in February and March 2016. (JA 3794-97).

Mr. Rowe occasionally ran fork trucks, and he worked as an oiler on cranes. (JA 66). He "did not have a lot of experience" as a crane operator. (JA

131). Mr. Rowe admitted that he worked more as an oiler than he did as a crane operator. (JA 66).

Erickson's selected Mr. Rowe for layoff because he had limited experience as a crane operator and the Company did not have enough work for an employee with such limited qualifications. (JA 131, 66). Mr. Erickson testified that Mr. Rowe finished work on a project in Detroit on Friday, May 13, 2016, and that the Company did not have any additional work to assign to him. Thus, Erickson's laid off Mr. Rowe on Monday, May 16. The Board did not make any finding to the contrary.

When Mr. Rowe was laid off, the 18 operators who remained had more qualifications than him. (JA 130-31). All of the retained employees were union members, and many had raised concerns or issues regarding their pay (JA 122). Mr. Erickson was not aware whether Mr. Rowe engaged in any conduct or union-related activity different from the operators who Erickson's did not lay off.

3. Erin Baerman

Erickson's selected Erin Baerman for layoff because it decided to list for sale the 40 ton crane to which he was assigned. Erin was only qualified to run a 40 ton crane, and after Mr. Stephenson and Mr. Rowe, he was "the next least qualified operator in the stable." (JA 132). That is, Erickson's did not have any

machines that Erin was qualified to operate once the Company decided to sell the 40 and 60 ton cranes.

When Erin was laid off, the 16 operators who were retained had more qualifications than him. (JA 132). Most of them had raised concerns or issues regarding their pay, (JA 122), and Mr. Erickson was not aware of whether Erin engaged in any conduct or union-related activity different from the operators who Erickson's did not lay off on June 20, 2016. (JA 132).

4. Jason Baerman

Erickson's selected Jason Baerman for layoff in connection with the decision to list its 60 ton cranes. Jason was assigned to one of those cranes, and it is undisputed that Jason was less qualified than the operators that continued to work for Erickson's after June 20, 2016. (JA 127). Most of the retained operators had raised concerns or issues regarding their pay (JA 122), and Mr. Erickson is not aware of whether Jason engaged in any conduct or union-related activity different from the operators who Erickson's did not lay off. (JA 132).

5. Nick Willer

Erickson's selected Nick Willer for layoff because he was assigned to one of the four small cranes being sold. Mr. Willer had no formal training on any of Erickson's larger cranes, and he was not qualified to run them. Thus, when

Erickson's decided to terminate the use of its 60 ton cranes, "there was no reason to keep Nick either." (JA 132).

It is undisputed that Mr. Willer was less qualified than the operators who continued to work for Erickson's after June 20, 2016. (JA 127). Most of those operators raised concerns or issues regarding their pay, (JA 122), and Mr. Erickson is not aware of whether Mr. Willer engaged in an conduct or union-related activity different from the operators who Erickson's did not lay off. (JA 132).

6. Carlos Ocampo

Erickson's selected Mr. Ocampo for layoff because he was assigned to one of the 40 ton cranes being sold. It is undisputed that Mr. Ocampo was less qualified than the operators who continued to work for Erickson's after July 7, 2016. (JA 127, 137). Most of those operators had raised concerns or issues regarding their pay, (JA 122), and Mr. Erickson is not aware of whether Mr. Ocampo engaged in any conduct or union-related activity different from the operators who Erickson's did not lay off. (JA 137).

II. PROCEDURAL HISTORY

The Union filed unfair labor practice charges against Erickson's on June 20, 2016. It filed amended charges on July 11, 2016 and August 16, 2016. The charges, and later the Complaint, alleged that the layoffs violated Sections 8(a)(1), (3), and (5) of the Act because Erickson's did not use seniority in choosing

the operators to layoff. The Union and General Counsel also alleged that the Company's major restructuring decision, which included the decision to sell hundreds of thousands of dollars in cranes, was motivated by animus toward employees, as some had raised minor pay disputes and sought the Union's assistance to resolve them.

During the hearing on April 26-28, 2017, Erickson's presented overwhelming evidence establishing that there was no contractual requirement to apply seniority when making layoffs, and there was no past practice to support such a claim. The General Counsel failed to preset a single piece of evidence supporting this allegation.

On August 11, 2017, only eight days after the parties filed their detailed post-hearing briefs, ALJ Ira Sandron issued a decision in which he concluded that the layoffs violated Sections 8(a)(1) and (3) and that Mr. Erickson's statements violated Section 8(a)(1).

Erickson's filed exceptions. The Board issued its Decision and Order on August 27, 2018. The Board overruled the ALJ and held that Mr. Erickson's comments during the June 20 layoff meeting were a lawful expression of his opinion and protected by Section 8(c) of the Act. The Board otherwise affirmed the ALJ's rulings, findings, and conclusions with slight modifications to his proposed order.

Erickson's filed its petition for review on November 5, 2018. The Board filed a cross-application for enforcement on November 30, 2018.

SUMMARY OF THE ARGUMENT

1. The Board failed to follow its own *Wright-Line* rule.

Under *Wright-Line*, dual motive cases will not result in violation of the Act. An employer does not violate the Act where it proves its affirmative defense that it would have laid off employees for legitimate business reasons. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 398-401 (1983). This holds true even if the General Counsel proves that the employer's union animus was a motivating factor in the discharge. *Id*. at 400.

Erickson's proved its affirmative defense by establishing that there were legitimate business reasons for its decision that would have resulted in the six layoffs regardless of any finding that union animus was a motivating factor. The Board "did not doubt" Erickson's plan to adapt to the long-term trends in the crane industry. Nevertheless, it held that Erickson's did not prove its affirmative defense because there was evidence of animus as a motivating factor, including evidence of suspicious timing and management statements.

The Board incorrectly applied *Wright-Line* and failed to follow its own rule. *Wright-Line* required the ALJ and Board to consider the impact of Erickson's undisputed and credited business rational for its decisions to sell small

cranes and lay off workers separately from the General Counsel's *prima facie* case. *Transp. Mgmt.*, 462 U.S. at 399; *NLRB v. Fluor Daniel*, 161 F.3d 953, 966 (6th Cir. 1998) ("the presence of an anti-union motivation is not the end of the matter.")

Here, the ALJ and Board failed to consider the cases separately. Instead, the Board relied on evidence of animus from part one of the *Wright-Line* analysis to preclude Erickson's from establishing its defense under part two—despite the overwhelming business case that the Board itself credited.

If allowed to stand, the decision would undermine and alter well-established law without explanation. There will be no second prong under *Wright-Line*, and evidence of animus as a motivating factor would be sufficient to undermine the employer's defense in all cases. Moreover, this Circuit has warned against this precise danger:

> While this analysis superficially seems simple, *Wright-Line* contains an analytic trap for the unwary. In a nutshell, it is all too easy to conflate the [animus] element of a Section 8(a)(3) violation with the affirmative defense that must be raised by the employer only after [the] elements of the violation have been established by the General Counsel. This would be a major error, inasmuch as the General Counsel has the burden of persuasion on [the] elements of the violation, while the employer has the burden of persuasion on the affirmative defense.

Fluor Daniel, 161 F.3d at 966 (emphasis added). By accepting the ALJ's analysis, the Board's Order was snared by this trap and is unenforceable.

2. Substantial evidence does not support the Board's conclusion that Erickson's business reasons were pretext.

Next, the Board's finding that Erickson's legitimate business reasons were pretext is also unenforceable and not supported by substantial evidence. The Board identified four reasons supporting its finding on pretext, but two of them were fully consistent with Erickson's credited business case and the remaining two were simply evidence of animus from the General Counsel's *prima facie* case. There is also Sixth Circuit law addressing this issue. In *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651 (6th Cir. 2005), the employer accelerated, because of union animus, an otherwise legitimate long-term plan to eliminate union jobs. But this Court refused to enforce the Board's order, holding that the employer "should not be punished for doing what it had already planned to do, simply because it took that action more quickly in the aftermath of the strike." *Id*. 665-66. The same result is required here. The Board credited Erickson's business case that would have required the layoffs, even if they were accelerated by union animus.

3. The Board improperly held that the General Counsel carried its *prima facie* burden.

Further, the Board erroneously held that the General Counsel met its *prima facie* burden. Under *Wright-Line*, the General Counsel must prove that (1) each employee engaged in protected activity; (2) the employer knew of the protected activity; and (3) each employee's protected activity motivated the

adverse treatment. *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 781 (6th Cir. 2002); *Center Const. Co., Inc. v. NLRB*, 482 F.3d 425, 435 (6th Cir. 2007). In this case, the Board held that Erickson's laid off the employees because they engaged in protected activity when they sought assistance from the Union regarding minor pay disputes. However, the Board admitted that the General Counsel failed to prove that Willer and the Baermans sought that assistance from the Union. Because there is no evidence to prove specific protected activity for these three individuals, the conclusion that the General Counsel carried its *prima facie* burden is not supported by substantial evidence.

The General Counsel also failed to prove that the employees' protected activity motivated their discharges. The Board held that Erickson's "selection of the six employees was not due to any particular union activity on their parts as individual individuals." However, under the *Wright-Line* analysis, the Board was required to make a "particularized showing" that each of the employees' protected activities motivated their layoffs. *FiveCAP*, 294 F.3d at 781. The Board improperly imputed alleged union animus to the six employees without the requisite specific, particularized findings as to each.

4. The Court should not enforce the punitive remedies ordered by the Board.

Finally, the Court should not enforce the Board's remedies. The Board exceeds its statutory authority when it awards a remedy that is punitive.

Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940). The Board's award here is punitive for two reasons. First, the Board's remedy of search-for-work expenses under *King Soopers, Inc.*, 364 NLRB No. 93 (2016), will result in more than make-whole relief for the employees.[9] Second, the Board cannot order the reinstatement of employees to nonexistent jobs. *We Can Inc.*, 315 NLRB 170, 175 (1994).

ARGUMENT

I. LEGAL STANDARDS

A. The Board Must Follow its Own Rules and Standards.

The Board must follow its own precedent and decisional rules, or fully explain its departure from them. *Int'l Union, UAW v. NLRB*, 802 F.2d 969, 972-74 (7th Cir. 1986); *Kellogg Co. v. NLRB*, 840 F.3d 322, 333 (6th Cir. 2016); *Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552, 560 (6th Cir. 2013); *Vencare Ancillary Servs. v. NLRB*, 352 F.3d 318, 321-22 (6th Cir. 2003) (refusing enforcement).

Although the Board may overrule its prior decisional rules, it must do so expressly. It may not do so by failing to apply those rules in a particular case. As the Fourth Circuit aptly summarized:

> The Board may not depart *sub silentio* from its usual rules of decision to reach a different, unexplained result in a single case, "there may not be a rule for Monday,

[9] The General Counsel has questioned this analysis, and ordered Regional Directors to submit cases involving these expenses to the Division of Advice for consideration of "alternative analysis[.]" (Memorandum GC 18-02, at 2, 4).

> another for Tuesday, a rule for general application, but denied outright in a specific case."

Roadway Express, Inc. v. NLRB, 647 F.2d 415, 419 (4th Cir. 1981).

B. The Substantial Evidence Standard

This Court reviews questions of law *de novo* and will not enforce a Board order having "no reasonable basis in law." *NLRB v. C.J.R. Transfer, Inc.*, 936 F.2d 279, 281 (6th Cir. 1991) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)) ("we have refused enforcement of Board orders where they had no reasonable basis in law, either because the proper legal standard was not applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning") (quotation marks omitted).

The Court reviews the Board's factual determinations and the Board's application of law to the facts under a substantial evidence standard. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *NLRB v. Jag Healthcare, Inc.*, 665 F. App'x 443, 448 (6th Cir. 2016) (internal punctuation omitted). The Supreme Court has explained courts' roles in applying the substantial evidence standard:

> [A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

Universal Camera Corp. v. NRLB, 340 U.S. 474, 488 (1951). This Court does not function as a "mere rubber stamp" for the Board's factual and credibility determinations. It must evaluate the entire record and acknowledge any evidence that undermines the Board's decision. *NLRB v. Cook Family Foods*, 47 F.3d 809, 816 (6th Cir. 1995).

II. THE COURT SHOULD NOT ENFORCE THE BOARD'S ORDER BECAUSE THE BOARD FAILED TO FOLLOW ITS OWN RULE.

A. Dual motive cases are permitted under *Wright-Line* and an employer does not violate the Act where it proves, as an affirmative defense, that the same employment actions would have taken place even if animus was a motivating factor.

The Board standard in this case was initially set forth decades ago in *Wright-Line*, 251 NLRB 1083 (1980) and *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983) (adopting the *Wright-Line* test).

Wright-Line has two distinct parts. First, the General Counsel has the burden of proving that the employee's protected conduct was a substantial or motivating factor in his or her discharge. *Transp. Mgmt.*, 462 U.S. at 400; *ITT Automotive v. NLRB*, 188 F.3d 375, 387 (6th Cir. 1999). Second, even if the employer fails to rebut the General Counsel's *prima facie* case and the Board finds that animus was a motivating factor, the employer can avoid liability by proving, through a preponderance of the evidence, that there was an independent, legitimate reason that would have resulted in the same adverse employment action. *Transp.*

Mgmt., 462 U.S. at 398-401. An employer does not violate the Act if it proves that it would have taken the adverse action regardless of the alleged animus. *Id*. at 400-03. Said differently, dual motive cases do not violate the Act.

Here, the Board's finding of animus as a motivating factor cannot be sufficient in the presence of its decision to credit the business case for layoffs. As this Court and the Supreme Court explained: "the presence of an anti-union motivation is not the end of the matter." *Transp. Mgmt*, 462 U.S. at 399 (internal punctuation omitted); *NLRB v. Fluor Daniel*, 161 F.3d 953, 966 (6th Cir. 1998).

The Board must consider the General Counsel's *prima facie* case and the employer's legitimate business reasons separately:

> The Board held [in *Wright-Line*] that the General Counsel of course had the burden of proving that the employee's conduct protected by § 7 was a substantial or a motivating factor in the discharge. Even if this was the case, and the employer failed to rebut it, the employer could avoid being held in violation of §§ 8(a)(1) and 8(a)(3) by proving by a preponderance of the evidence that the discharge rested on the employee's unprotected conduct as well and that the employee would have lost his job in any event.

Transp. Mgmt., 462 U.S. at 400 (footnote omitted) (emphasis added). According to the Second Circuit:

> So an employer should be able to argue to the Board that improper motivation was not proven and, in the alternative, that even if improper motivation was proven, the employer has established its affirmative defense.

Holo-Krome Co. v. NLRB, 954 F.2d 108, 114 (2d Cir. 1992). Under extant Board law, and contrary to the instant Order, an employer's failure to rebut the General Counsel's *prima facie* case is not fatal to its affirmative defense.

B. The Board failed to follow its own *Wright-Line* rule because it did not consider separately the General Counsel's *prima facie* showing of animus and Erickson's legitimate business case.

The Board will consider the employer's affirmative defense only if the General Counsel first proves a *prima facie* case. *Transp. Mgmt.*, 462 U.S. at 400; *Fluor Daniel*, 161 F.3d at 966; *Holo-Krome*, 954 F.2d at 113. The fact that an employer's evidence was insufficient to rebut the General Counsel's *prima facie* case does not preclude the Board from finding that the employer proved its affirmative defense. *Holo-Krome*, at 113.

Here, the Board credited Erickson's business analysis and justification. It did "not doubt Erickson's contentions concerning general business trends in the industry and his long-term plans to adapt to them." (JA 16). Nevertheless, the Board concluded that Erickson's failed to prove that it would have laid off the operators if they had not engaged in protected activity:

> [T]he Respondent has not satisfactorily demonstrated that the timing of the layoffs in 2016 was based on specific economic conditions or events occurring in the months immediately preceding them, rather than on animus toward the Union for its increased assertiveness in representing unit employees.

Id. This conclusion is erroneous as a matter of law. The Board failed to follow its own *Wright-Line* standard, and its conclusion is not supported by substantial evidence.

1. The Board erred when it shifted to Erickson's the burden of proving that it did not act based on union animus.

The Board's conclusion that Erickson's failed to prove that its decision was devoid of union animus should not have been determinative. Indeed, the purpose of the *Wright-Line* analysis is to allow Erickson's to prove that, despite any union animus, it would have laid off the operators anyway. *Fluor Daniel*, 161 F.3d at 966 ("The presence of an anti-union motivation is not the end of the matter."). *Wright-Line* does not require Erickson's to prove the absence of union animus to satisfy its affirmative defense.

The Board must independently consider Erickson's rebuttal to the General Counsel's *prima facie* case and Erickson's affirmative defense. *Holo-Krome*, 954 F.2d at 113. The Board did not do that here. Instead, it conflated the two parts, finding that Erickson's did not act for legitimate business reasons because it failed to rebut the General Counsel's evidence of animus. The Board's shifting of burdens – requiring Erickson's to prove both that it did not act on union animus and that it acted for legitimate business reasons – is an error of law that is contrary to *Wright-Line* and Board precedent. *Transp. Mgmt.*, 462 U.S. at 401 (*Wright-Line* "extends to the employer what the Board considers to be an

affirmative defense but does not change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving.") (emphasis added).

> This Court has previously warned against this exact error:
>
> > While this analysis superficially seems simple, *Wright-Line* contains an analytic trap for the unwary. In a nutshell, it is all too easy to conflate the [animus] element of a Section 8(a)(3) violation with the affirmative defense that must be raised by the employer only after [the] elements of the violation have been established by the General Counsel. This would be a major error, inasmuch as the General Counsel has the burden of persuasion on [the] elements of the violation, while the employer has the burden of persuasion on the affirmative defense.

161 F.3d at 966 (emphasis added). The Board committed this major error here. Its decision cannot be enforced. Indeed, enforcing the Board's Order would render the second prong and affirmative defense under *Wright-Line* a nullity. Evidence of animus would undermine even the strongest, credited business cases supporting an employer's action. That's not the law and the Board's Order fails to explain its departure from controlling authority.

2. Overwhelming evidence proves that Erickson's laid off the employees for legitimate business reasons and that it would have laid off the employees despite union animus.

In considering Erickson's affirmative defense, this Court "looks to the totality of the circumstances in reviewing whether substantial evidence supports [the] defense that it would have taken this action in the absence of" the alleged protected activity. *APX Intern v. NLRB*, 144 F.3d 995, 1001 (6th Cir. 1998). The

totality of the circumstances – and the undisputed evidence – prove that Erickson's would have laid off the six operators in the summer of 2016 regardless of any union animus because that was the "perfect time" to sell the small cranes they were assigned.

Steve Erickson had been contemplating leaving the small crane market since at least July 2015, well before the Union took a more active role in resolving minor payroll disputes.[10] (JA 129). And beginning in March 2016, Erickson's conducted a detailed and in-depth analysis of its business structure and the work it performs, with a particular emphasis on its cranes.

This analysis, detailed in Section I.B. *supra*, led Erickson's to the inevitable conclusion that the future success of the Company depended on exiting the small crane market and placing a corresponding emphasis on work performed by large cranes. This decision simply made sense, and Erickson's would have listed the small cranes for sale regardless of any union animus.

The substantial evidence also proves that Erickson's would have listed the cranes for sale in 2016 regardless of the Union. Indeed, it is undisputed that there is a time in the life of every crane when the Company has obtained the

[10] Mr. Erickson was aware of the declining trends in the small crane market, and had considered exiting the small crane market as early as July 2015 when he warned Stephenson about layoffs within the Union. Erickson's started this detailed analysis in March 2016 because it had recently hired Brent Erickson.

maximum profit from its operation, but it has not yet required extensive and expensive maintenance. This "sweet spot" typically occurs after Erickson's has owned a crane for 10 years or operated it for 10,000 hours. The "perfect time" to sell a crane is when it is in the "sweet spot," but before it is operated to the point that it requires that additional maintenance. Erickson's 40 and 60 ton cranes fit this "sweet spot" in 2016: Erickson's purchased the cranes in 2005, and it had not operated any of the four cranes for more than 10,000 hours.

Erickson's would have listed the small cranes for sale in 2016 regardless of any union activity or animus because that was its best opportunity to maximize its profit from their resale. The Company's decision to sell was not based on any consideration of the Union or protected activities. The General Counsel did not present any evidence to suggest otherwise. And, by crediting Erickson's long-term plans to adapt to the small crane market, the Board agreed.

In *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651 (6th Cir. 2005), the employer was moving to a new facility and needed fewer drivers, so it planned to gradually lay off 13 drivers and eliminate their jobs starting in July 1999. On June 26, 1999, all of the drivers went on a one-day strike. They offered to return to work the next day, but the employer refused and locked them out. On July 1, the employer laid off all 13 employees at once – contrary to its plan to lay off the

drivers gradually. *Id*. at 655, 657. The Board held, under *Wright-Line*, that the employer unlawfully laid off the drivers in retaliation for the strike. *Id*. at 663.

The Sixth Circuit refused to enforce the Board's order. The court held that the employer laid off the drivers for a legitimate business reason: it had eliminated their jobs. Thus, the layoffs did not violate the Act, even if they were "expedited" because of the strike:

> The doctrine of entrepreneurial discretion holds that an employer may make significant changes in its operations "so long as its change in operations is not motivated by the illegal intention to avoid its obligations under the National Labor Relations Act." This case does not present a situation in which, after the strike, DNI suddenly decided to find a way to cut back its runs for no reason other than to spite the Union. The reduction in runs had been in the works not only well before the strike but well before DNI had any inkling that the Union might call a strike. The move to the new facility was dictated by pure business judgment, not anti-union animus or a desire to chill participation in the Union. DNI should not be punished for doing what it had already planned to do, simply because it took that action more quickly in the aftermath of the strike.

Id. at 665-66 (citations omitted) (emphasis added).

Similarly, this is not a case where Erickson's decided to exit the small crane business, sell the 40 and 60 ton cranes, and lay off the six employees "for no reason other than to spite the Union." The substantial and undisputed evidence proves that Erickson's decided to exit the small crane market and list for sale the 40 and 60 ton cranes because there was a significant decline in the total work

available for operators in 2016 (a trend that continued in 2017), and because Mr. Erickson determined that the future success of the Company depended on exiting the small crane market. This was an exercise of entrepreneurial discretion.

Unlike the employer in *Dayton Newspapers*, the employees' alleged protected or union activity did not expedite the layoffs here. But even if it had, there would be no violation of the Act.

The substantial and undisputed evidence proves that this legitimate business decision had been in the works since at least July 2015 – well before Rowe, Stephenson, or Ocampo approached the Union for assistance with wage disputes.[11] And the layoffs occurred in 2016, not because the employees allegedly engaged in protected activity, but because 2016 was the "perfect time" to sell the cranes. These facts all support Erickson's "contentions concerning general business trends in the industry" and they all support Erickson's "long-term plans to adapt to them." They were credited by the Board and are supported by substantial evidence. They prove that Erickson's would have laid off the operators in May, June, and July 2016 regardless of their alleged protected or union activity.

[11] There is no evidence in the record that Willer, Erin Baerman, or Jason Baerman went to the Union for assistance with wage disputes. *See infra* 46-49.

C. Substantial evidence does not support the Board's conclusion that Erickson's business reasons for the layoffs were pretext.

When the Board determines that the employer's legitimate business reason is pretext, this Court's substantial evidence standard of review is "of a slightly different stripe … The inquiry is not so much whether substantial evidence supports the Board's … determination [that the employer's reason was pretextual] as whether the Board's finding [the employer's] evidence insufficient is reasonable in view of the evidence as a whole." *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 873-74 (6th Cir. 1995). The Board's finding of pretext is not supported by substantial evidence if this Court finds that the employer's legitimate reason is plausible. *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1486 (6th Cir. 1993).

The ALJ identified four factors on which he concluded that Erickson's did not in fact rely upon its business justifications:

> (1) no regular full-time operators were ever permanently laid off or terminated in the several decades prior to 2016; (2) the terminations closely followed the Union's leadership taking a more proactive stance in representing employees' interests; (3) Erickson repeatedly made statements to employees that tied in terminations with the Union's conduct; and (4) Erickson, by his actions and his own words, was "in no hurry" to sell any of the cranes that he offered for sale, including the 40- and 60-ton cranes.

(JA 16).

In other words, the Board found that Erickson's legitimate reason was pretext because it found that the General Counsel proved animus. But *Wright-Line* does not allow the Board to flip-flop like this. *Wright-Line* requires the Board to find that Erickson's did not violate the Act if it would have taken the same actions based on its business case, even if the General Counsel proved union animus.

Here, the Board credited Erickson's business case but then claimed it did not believe it because it found that timing and Mr. Erickson's statements proved animus. This inexplicable flip-flop is not only confusing but constitutes a reversible error of law. A finding of animus as a motivating factor cannot end the inquiry.

The ALJ's pretext factors and conclusions are also conclusory and not supported by substantial evidence. Examining each of the reasons given by the ALJ further highlights the Board's analytical and legal errors.

First, the lack of previous permanent layoffs has nothing to do with the undisputed current market conditions supporting the sale of small cranes. There was absolutely no evidence presented that Erickson's had experienced a similar set of circumstances in the past and had decided not to sell cranes or making permanent layoffs. As such, it was illogical for the ALJ to conclude that the lack of prior layoffs "in the several decades prior to 2016" supported a finding of pretext. *Behnke, Inc. v. NLRB*, 67 F.3d 299, at *2 (6th Cir. 1995) (table

decision) (legitimate business reason is not pretext where the employer bases the decision on a review of internal business records).

Next, it was not reasonable for the ALJ to conclude that Mr. Erickson was "in no hurry" to sell the cranes. Waiting and wanting to maximize the sale price for this equipment was fully consistent with Erickson's business objectives and entrepreneurial discretion.

More specifically, the ALJ cited an August 29 email from Mr. Erickson to Mr. Landres as evidence that "sheds considerable doubt on whether the timing of the layoffs was based on bona fide business considerations." The email was contained in a chain of messages that started on July 13, 2016, when Mr. Erickson sent Mr. Landres and two other crane dealers an email and stated: "We have some cranes and accessories listed on the attached spreadsheet that are for sale." (JA 4049-50). Both Mr. Erickson and Brent Erickson testified that they considered the cranes to be "for sale" in July 2016. (JA 102, 119).[12]

Mr. Landres replied to Mr. Erickson on July 14, and again on August 29. In the August 29 message, Mr. Landres asked if Erickson's was interested in

[12] Erickson's work orders from July 2016 confirm this. (JA 158-476). The four cranes at issue were effectively pulled from service, and were scheduled to work a total of only nine jobs during the entire month. That is, the cranes were scheduled for jobs on less than 11% of the possible days that they could have worked during July 2016.

selling the cranes. Mr. Landres also indicated that the small crane market had "declined a bit further" since mid-July.[13]

The ALJ cited Mr. Erickson's reply that "I am not in any hurry to sell anything" as evidence of pretext. But the ALJ failed to consider the full message sent by Mr. Erickson to Mr. Landres. It states, in relevant part:

> I am interested in selling some machines. The numbers your [sic] using appear to be auction pricing which has been quite low recently.
>
> I am not in any hurry to sell anything and will wait for the right buyer that wants well maintained equipment.
>
> With that said, I do understand the market is down and would be willing to look at offers that fall between your pricing and my pricing.

(JA 4057) (emphasis added). The last part of the message, ignored by the Board, is critical to understanding Mr. Erickson's statement. Contrary to the Board's finding, Mr. Erickson said he was interested in selling his machines, but because prices were low, he was not in a hurry to sell for the sake of selling. Thus, the Board's conclusion that Erickson's was "in no hurry" to sell the cranes was

[13] While the Board found that Erickson's delay in selling cranes was indicative of pretext, the fact that the small crane market had "declined a bit further" in a 45 day period is evidence that corroborates Erickson's conclusion that the small crane market was declining and that there was less work for small cranes in West Michigan. After all, if the demand for work performed by small cranes was as booming, the market for the small cranes themselves should have been robust, not declining.

unreasonable and not supported by substantial evidence. Wanting to maximize the sale price was not proof that Erickson's failed to act for its legitimate reasons.

Finally, the ALJ relied on the timing between protected activity and Mr. Erickson's alleged statements about the Union suggesting that this is another reason why Erickson's did not rely upon its business case for the six layoffs. As detailed above, this is merely evidence of animus, which must be considered separately from the business case in examining Erickson's affirmative defense. Even if this evidence may support a prima facie case that animus was a motivating factor, it cannot be relied on to undermine a credited business case showing that the same actions would have been taken without such animus.

Further, the fact that Erickson's laid off the operators months after the Union became more active in raising and pursuing wage disputes does not decrease the plausibility of Erickson's legitimate reasons. Erickson's decided to sell the small cranes in 2016 because it was exiting the small crane market and the cranes were in their sweet spot. Specifically, it laid off Stephenson and Rowe in May when they finished the project they were assigned. It laid off Willer and the Baermans in June because the Company had already decided to sell the 40 and 60 ton cranes to which they were assigned, and those cranes were not scheduled for any additional work. Finally, it laid off Ocampo in July because it decided to sell the 60 ton crane to which he was assigned, and he (and the crane) had recently

finished a project. In short, the Board credited Erickson's business case and the Company "should not be punished for doing what it had already planned to do" simply because the Union changed its practices in the meantime. *Dayton Newspapers*, 402 F.3d at 666.

D. The Board improperly held that the General Counsel carried its *prima facie* burden of proving that all six operators engaged in protected activities, and that those activities motivated the layoffs.

Wright-Line first requires the General Counsel to prove that union animus was a substantial and motivating factor in the layoffs in question. To carry this burden, the General Counsel must prove: (1) the employee engaged in protected activity; (2) the employer knew of the protected activity; and (3) the employee's protected activity motivated the adverse treatment. *Center Const. Co., Inc. v. NLRB*, 482 F.3d 425, 435 (6th Cir. 2007).

1. Substantial evidence does not support the Board's conclusion that the employees' protected activity motivated their discharges.

The Board held that Erickson's "selection of the six employees was not due to any particular union activity on their parts as individual individuals[.]" (JA 16). This is the wrong standard under *Transp. Mgmt*. The Board was required to make a "particularized showing" that the employees' protected activities motivated the layoffs. *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 781 (6th Cir. 2002); *Centr Const. Co., Inc.*, 482 F.3d at 435.

In *FiveCAP, Inc.*, the employer discharged two employees based on anti-union animus. Due to the discharges and another employee going on sick leave, it was unsafe for the final employee, Burkel, to work on his own. The employer thus laid off Burkel. In analyzing the lawfulness of Burkel's layoff, the Board conducted a two-step analysis under *Wright-Line*. It first concluded that the employer carried its burden of proving a legitimate reason for Burkel's layoff: safety. However, the Board concluded that because prior unlawful layoffs were the proximate cause of the safety concerns, Burkel's layoff was also unlawful. 294 F.3d at 781.

This Court rejected the Board's analysis. It noted that, throughout a proceeding, the General Counsel has the burden of proving that the employer acted on the basis of union animus. However, the Board failed to hold the General Counsel to that burden and "merely imputed [onto Burkel's layoff] the burden that the General Counsel carried with respect to" the other employees. *Id*. The Court held:

> Once the Board determined that FiveCAP possessed a legitimate reason for laying off Burkel, thus satisfying its burden under *Wright-Line*, the General Counsel is required to make a particularized showing that FiveCAP nonetheless acted on the basis of anti-union animus. The Board cannot simply infer such animus from separate acts involving other employees, particularly here, where there exists a neutral fact heavily contributing to Burkel's layoff: Monton's absence due to sick leave.

Id. (emphasis added). This requirement of a "particularized showing" is a requirement established by the Board itself in *Wright-Line*:

> [O]ur task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment.

251 NLRB at 1089. *See also Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 419 (2004) (reversing ALJ because there were "insufficient facts to show that the Respondent's animus against Rosario's union activity was a motivating factor in the decision not to recall him").

Here, the Board committed the same error that this Court refused to enforce in *FiveCAP*. That is, the Board concluded that if some operators went to the Union for assistance in resolving minor pay disputes, and if Erickson's was allegedly unhappy that those operators sought assistance from the Union, then Erickson's must have laid off all six employees because of that alleged general unhappiness about others' protected activities. This improperly imputes animus to all six employees in question without a specific finding that each employee engaged in their own protected activities, motivating their layoffs.

That the Board failed to hold the General Counsel to its burden is especially apparent in light of the fact that all six of the operators selected for layoffs were Erickson's least qualified operators. This legitimate and undisputed

business reason eliminates even the mere possibility that the General Counsel could make a particularized showing that Erickson's laid off operators because of union animus.

2. The Board erroneously found that the General Counsel carried its *prima facie* burden of proving that all six operators engaged in protected activity.

The Board held that Ocampo, Rowe, and Stephenson took their pay disputes to the Union, which resolved the disputes with Erickson's. This, according to the Board, satisfied the first two elements of the General Counsel's *Wright-Line* burden because the employees engaged in union activity known to Erickson's. However, the Board also found that "[t]he record does not reveal whether the remaining three terminated operators also engaged in such activity." (JA 15). That is, the Board admitted that the General Counsel failed to prove that Willer, Erin Baerman, and Jason Baerman engaged in protected activity, that Erickson's knew of that activity, and that the activity motivated their discharges. Without such evidence there was no substantial evidence to support a prima facie case for any of those three employees.

In an attempt to avoid this fundamental defect, the ALJ put forth three reasons why the complete lack of evidence was allegedly "not a fatal flaw in the General Counsel's case." None is a proper application of the law or supported by substantial evidence.

a. The Board's holding that Erickson's suspicion that Willer and the Baermans engaged in protected activity is not supported by substantial evidence.

First, the ALJ relied on *NLRB v. Link-Belt Co.*, 311 U.S. 584, 590-91 (1941) for the proposition that employees are protected from discriminatory conduct due to their suspected union or protected activity. The problem, however, is that the General Counsel never argued this theory or presented any evidence – let alone proved – that Erickson's discharged Willer and the Baermans because it suspected that they took their pay disputes to the Union or engaged in other protected activities. The Board likewise did not cite any evidence that supported its conclusion that *Link-Belt* saved the General Counsel's case. Thus, the Board's conclusion that the General Counsel proved that Willer and the Baermans engaged in protected activity is not supported by substantial evidence.

b. The Board erroneously held that the General Counsel did not need to prove protected activity because this was a "mass layoff" situation.

Second, the ALF concluded – again without any explanation or citation to the record – that the General Counsel need not prove protected activity in "mass layoff situations." (JA 15). The parties never litigated this issue. Indeed, the General Counsel never alleged the layoffs here were a mass layoff and Counsel for the General Counsel never even mentioned a "mass layoff" until her brief in response to Erickson's exceptions to the ALJ's decision. Thus, the Board was

precluded from finding that this was a mass layoff situation. Its holding was an error of law that prohibits enforcement of its order. *See, e.g., Marlene Indus. Corp. v. NLRB*, 712 F.2d 1011, 1018 n.9 (6th Cir. 1983) (the Board cannot enforce orders based on issues that are not fully and fairly litigated).

Instead, the Board should have considered whether each of the six employees engaged in protected activity, and whether Erickson's knew that each of the employees engaged in protected activity. The Board's failure to consider each employee individually "preclude[s] a finding on the traditional claim that the employer selected the employees for layoff in a discriminatory fashion." *Vemco*, 989 F.2d at 1478 n.11. Thus, the Board's conclusion that the six employees engaged in protected activity may be "supported by substantial record evidence only where the GC showed that [Erickson's] had specific knowledge of an employee's [protected activity] at the time the selection was made." *Id*. Consequently, the Board's conclusion that Nick Willer, Erin Baerman, and Jason Baerman participated in union or protected activity is not supported by substantial evidence, and the General Counsel failed to carry its *prima facie* burden.

c. The Board's order is unenforceable because it failed to follow its precedent that union membership is not protected activity.

Finally, the ALJ concluded that Nick Willer, Erin Baerman and Jason Baerman engaged in protected activity because "the Union's conduct on behalf of

operators in general, and Erickson's knowledge thereof, are undeniable." Under Board precedent, however, union membership alone is not protected activity. *Midwest Television, Inc.*, 343 NLRB 748, 751 (2004). The Board did not follow its own precedent or fully explain its departure from it, rendering its order unenforceable. *Kellogg Co. v. NLRB*, 840 F.3d 322, 333 (6th Cir. 2016).

III. THE COURT SHOULD NOT ENFORCE THE REMEDIES AWARDED BY THE BOARD.

The Board exceeds its statutory authority when it awards a remedy that grants employees something more than make-whole relief. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940) (the Board is not "free to set up any system of penalties which it would deem adequate" to "have the effect of deterring persons from violating the Act"); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938) (the Board's authority to devise remedies "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.").

A. This Court should not enforce the Board's order of search-for-work expenses because the remedy allows employees to exceed a make-whole remedy and is punitive.

In *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Board overruled more than 80 years of precedent and decided that search-for-work expenses should

not be offset from interim earnings. *Id*. slip op. at 5. While the Board's prior process for calculating search-for-work expenses made employees whole in almost every case, the new remedy often results in greater than make-whole relief. Here, the remedy would allow the employees to profit from Erickson's legitimate business decision.

The General Counsel has recognized the Board's overreach, and has ordered Regional Directors to submit to the Division of Advice any case in which the Region may seek search-from-work expenses independent from interim earnings. (Memorandum GC 18-02).

Therefore, the Court should refuse to enforce the Board's order that penalizes Erickson's and awards a windfall to the employees.

B. Erickson's cannot reinstate the six discriminatees because there is not sufficient work for them to perform.

The Board ordered that Erickson's "must offer [the discriminatees] full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed." (JA 17). However, as discussed above (and as the ALJ and Board found), Erickson's is exiting the small crane market, and there is no work available for the six discriminatees to perform. This is undisputed – the General Counsel failed to present any evidence of available work for these six employees; the Board did not find that there is work available for

them; and there is no evidence that Erickson's has turned down any available work. The work orders (JA 158-3733) show that the number of times the small cranes were used would not support even the hiring of one full-time employee.

The Board cannot require an employer to create work for these six employees out of thin air. *See We Can Inc.*, 315 NLRB 170, 175 (1994) ("The Board does not order the reinstatement of employees to nonexistent jobs."). And the Board's order to reinstate the six employees will force Erickson's to lay off six better qualified and more senior operators to accommodate the order. This leads to significant safety and operational concerns, especially because Erickson's has continued to shift its focus to owning and operating large cranes that the discriminatees are not qualified to operate. Finally, the order picks winners and losers among union employees, all of whom engaged in the same protected activity. It is therefore punitive and beyond the Board's authority. *Republic Steel*, 311 U.S. at 11-12; *NCR v. NLRB*, 466 F.2d 945, 967 (6th Cir. 1972) ("any affirmative action ordered by the Board must be remedial rather than punitive in nature").

CONCLUSION

For these reasons, Erickson's respectfully asks the Court to grant its Petition for Review, deny the Cross-Application for Enforcement, and vacate the Order.

Respectfully submitted,

Date: February 20, 2019

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief was prepared in 14 point "Times" proportionally spaced font. This brief contains 55 pages (12,944 words), excluding the table of contents, table of authorities, statement in support of oral argument, this certificate of compliance, and the certificate of service.

Dated: February 20, 2019

/s/ *Keith E. Eastland*

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2019, the foregoing was filed through the Court's Electronic Filing System, which will send notice to all counsel appearing in this matter.

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